Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2000 Biennial Regulatory Review –	)	
Comprehensive Review of the	)	CC Docket No. 00-199
Accounting Requirements and	)	
ARMIS Reporting Requirements for	)	
Incumbent Local Exchange Carriers:	)	
Phase 2 and Phase 3	)	

PHASE 3 FURTHER REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

Introduction

The National Association of State Utility Consumer Advocates ("NASUCA") offers these reply comments in response to initial comments filed in pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") released in this docket on November 5, 2001.[1] NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA's members are designated by the laws of their

[1] NASUCA responds to the Joint Comments of BellSouth, SBC, Verizon, Qwest, Frontier and CBT ("Large ILECs"); Illinois Commerce Commission ("IllCC"); Independent Telephone & Telecommunications Alliance ("ITTA"); Indiana Utility Regulatory Commission ("IndURC"); Michigan Public Service Commission ("MiPSC"); National Association of Regulatory Utility Commissioners ("NARUC"); Public Service Commission of Wisconsin ("WisPSC"); Rural Utilities Service ("RUS"); Sprint Corporation ("Sprint"); WorldCom, Inc. ("WorldCom"). The relatively few comments filed in this part of this phase suggests strongly that the Commission is reaching a point of diminishing returns. In addition, many of the issues put out for comment by the Commission (see FNPRM at ¶¶ 211, 214, 215, 216) received little if any comment.

respective states to represent the interests of utility consumers before state and federal regulators and in the courts.[2]

The Ohio Consumers' Counsel ("OCC") and NASUCA previously filed comments and reply comments in Phase 2 and the first part of Phase 3 of this proceeding, in response to the Notice of Proposed Rulemaking ("NPRM") released October 18, 2000. In Phase 2, the Commission requested comments on "various measures to eliminate or streamline existing accounting and reporting requirements" included in the current rules of the Commission. Notice, ¶ 2.[3] In the initial part of Phase 3, the Commission stated that it would "consider the appropriate indicia for more significant deregulation in this area." *Id*. As explained later in the Notice, the Commission sought

> to undertake a broader examination of Part 32 and ARMIS requirements with the goal of determining what additional changes can be made as competition develops, and addressing ultimately what, if any, specific accounting and reporting requirements are necessary when local exchange markets become sufficiently competitive.

Id., ¶ 87.[4]

The Commission now seeks to "refresh the Phase 3 record in light of the findings and actions taken today" in the accompanying Report and Order ("R&O") that addressed Phase 2. The Commission has not as yet taken any action on Phase 3.

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[2] See, e.g., Ohio Rev. Code Chapter 4911.

[3] The OCC and NASUCA filed initial and reply comments in Phase 2 on December 21, 2000 and January 30, 2001 respectively.

[4] The OCC filed initial and reply comments in Phase 3 on February 13, 2001 and March 14, 2001 respectively. Additional comments were also filed on July 13 and July 26, 2001.

As the initial comments in response to the FNPRM show, there are two key areas in which the record can be refreshed by correcting fundamental errors in the Commission's approach to deregulating carriers' accounting and reporting requirements:

1. Section 11 of the 1996 Telecommunications Act is Congress' direction to the Commission on how to review its accounting regulations.[5] Hence the Commission's stated purpose in the R&O of "going beyond section 11 to determine whether our accounting rules must be revised and streamlined" (R&O at ¶ 23) lacks a basis in the statute. Although NASUCA has not objected to the findings of the Commission Phase 2, any further relaxation of the accounting and reporting requirements, in the absence of "meaningful economic competition for local exchange services" (*id*.), will be well out of bounds.
2. The Commission "believe[s] that, if we cannot identify a federal need for a regulation, we are not justified in maintaining such a requirement at the federal level." FNPRM at 207. The fact that the states -- individually and collectively -- need the information provided by the federal accounting rules and the ARMIS reports is a need that justifies a uniform national ("federal") rule.

Arguments supporting these and certain other conclusions arising from other parties' comments are presented below.

As an initial matter, the Commission should consider whether now is the time to further relax the accounting regulations that apply to the telecommunications industry. Possible accounting irregularities are prominent in today's news: From Enron[6] to Arthur Andersen[7] to Qwest[8] to Global Crossing,[9] it appears that the public need is for more

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[5] 47 U.S.C. § 161.

[6] "After Enron, tighter rules," The Cleveland Plain Dealer, April 15, 2002 at B6; "Enron scandal elicits many a call for reform," The Toledo Blade, February 13, 2002 at A15.

[7] "Andersen Agonistes," The Wall Street Journal, March 5, 2002 at A16.

[8] "Qwest says S.E.C. will review its accounting practices," The New York Times, April 5, 2002 at C3; "S.E.C. may act on Qwest earnings data," The New York Times, April 2, 2002 at C12.

[9] "Analysts fault the accounting at Global Crossing," The Wall Street Journal, January 30, 2002 at A8; "Global Crossing to probe accounting claims," The Cleveland Plain Dealer, February 5, 2002 at C7.

disclosure, not less; for more detail of corporate operations, not less. A sense of caution should pervade the Commission's review of the accounting rules. See RUS at 2.

1. "Meaningful economic competition" is the specific statutory basis for determining whether Commission regulations are no longer necessary.

Phase 3 of this proceeding, like Phase 2, is part of the Commission's inquiry pursuant to the directive of 47 U.S.C. § 161, which requires the Commission biennially to review its regulations pertaining to telecommunications service to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." The starting point for any long range inquiry, then, must be the current state of competition between local exchange providers. NASUCA is not aware of any evidence that shows that, for residential customers at least, meaningful economic competition exists anywhere in the United States.

None of the commenters supporting elimination of the accounting rules made an attempt to refresh the record by showing that competition had become "meaningful" since the last round of comments in Phase 3.[10] The FCC's own information shows that, nation-wide, 94.5% of residential and small business customers are still served by the

[10] "Nor is it credible to argue that the pace of competition is slowed because of existing accounting mandates." WisPSC at 3.

incumbent local exchange carriers ("ILECs").[11]

Under any stretch of the imagination the ILECs are dominant or near monopolies in their markets.[12] This means that the accounting rules cannot be dispensed with.[13]

The Commission's decision to go beyond § 11 effectively means that the Commission has accepted Qwest's view that 47 U.S.C. § 161 ("Section 11") "establishes a presumption that regulation is not necessary…" See Qwest Phase 3 Comments at 3, n.10. This argument was also raised by Qwest in its Phase 2 comments (see *id*. at 2); the OCC and NASUCA responded to Qwest's argument in their Phase 2 reply comments (at 12). At this point, the OCC and NASUCA would reiterate their point that under Qwest's interpretation, as well as under the Commission's view expressed in the R&O, the requirement to show meaningful competition would be mere surplusage. That is clearly not the intention of the Act.

This portion of the Act explicitly requires the existence of meaningful economic competition *before* repeal or modification of regulation is necessary. Deregulation is not

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[11] "Local Telephone Competition: Status as of June 30, 2001," FCC Industry Analysis Division (February 2002), Table 2. The Commission's conglomeration in these reports of residential and small business customer competition levels masks the insignificant reach of competition among residential customers. *See In the Matter of Local Competition and Broadband Reporting*, CC Docket No. 99-301, Comments of the Ohio Consumers' Counsel and the National Association of State Utility Consumer Advocates (March 19, 2001).

[12] The OCC and NASUCA previously proposed that only upon a showing of non-dominance should the accounting rules be eliminated. Accord, NARUC at 11. The Commission previously described the conditions that made AT&T non-dominant at a 60% market share: Lack of control of bottleneck facilities; facing "at least two full-fledged facilities-based competitors"; and customers having "numerous" choices. *In the Matter of the Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order (October 23, 1995), 11 FCC Rcd 3271 ("*AT&T Non-dominance Order*") at ¶¶70-71.

[13] The statutory standard that requires meaningful economic competition precludes the Commission's proposal of a specific sunset date for the accounting regulations. See FNPRM at ¶ 209-210.

a reward for the ILECs allowing competition; neither is it dessert after a meal. See ITTA at 3, n.7. Deregulation is removal of the controls that were placed on incumbent providers, once their market power has diminished to the point where that market power cannot be used to disadvantage consumers or competitors.[14] The notion that deregulation will facilitate competition requires acceptance of the proposition that removing burdens and oversight from dominant carriers will encourage them to become less dominant. Deregulation before competition will allow the dominant carriers to maintain their dominance. That was not a goal of the Telecommunications Act of 1996.[15]

The Large ILECs state that

> [B]oth sections 10 and 11 of the … Act … *require* the Commission to forbear from applying regulations that are not "necessary." As the District of Columbia Court of Appeals has recently reaffirmed, section 11 "is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."

Large ILECs at 3 [footnotes omitted], citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1050 (D.C. Cir. 2002). The Large ILECs miss the primary criterion for this "forbearance," however: Under section 11 the Commission can *only* forbear from regulation in the presence of meaningful economic competition.[16] The finding of

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[14] ITTA indicates that "the antitrust laws will remain an effective deterrent to predatory pricing and unlawful cross-subsidization…" ITTA at 4. This ignores the reality of the local exchange service business, which is only now emerging from a century of monopolies that had the protection of laws and regulators alike.

[15] Notably, Sprint agrees that now is not the time for further relaxation of the accounting and reporting requirements. Sprint at 3.

[16] *Fox Television* actually looked at § 202(h) of the Act, which requires forbearance upon a finding of "competition," not the "meaningful economic competition" required by § 11.

forbearance under section 10 -- which is not at issue in this proceeding -- requires a much more complex weighing of the public interest.

Notably, although the Large ILECs assert (at 6-35) that the Commission should eliminate virtually every accounting and reporting requirement currently on the books, the assertion is made without the necessary demonstration of meaningful economic competition.[17] Hence the Large ILECs must not feel the need to refresh the record developed in the first part of Phase 3; as shown by OCC/NASUCA in the Phase 3 Reply Comments, that record is inadequate to justify wholesale elimination of the accounting and reporting requirements.[18]

The Large ILECs (at 10-14) and ITTA (at 8-9) specifically argue for the elimination of the continuing property records ("CPR"). NASUCA's initial comments in this round show the continuing need for the CPR requirement. See also MiPSC at 8; NARUC at 20-22; RUS at 5; WisPSC at 10-11.

2. Ensuring that nationwide accounting information is available, such that each state can assess its own conditions and have a uniform basis for comparisons among states, is a valid federal purpose under the Telecommunications Act of 1996.

The Commission does not provide a detailed rationale for its tentative conclusion that federal accounting requirements require a federal purpose. FNPRM, ¶ 207. Given

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[17] On the other hand, WorldCom cites "the sharp slowdown in CLEC activity…." (WorldCom at 2) and Sprint (at 5) calls competition "nascent at best and faltering at present."

[18] The record is even less supportive of the request of ITTA for eliminating the accounting and reporting requirements for mid-sized carriers. ITTA at 2-10. There is noticeably less competition in the territories of ITTA's membership than in most of the Large ILECs'.

recent Court of Appeals decisions, it does not seem that the Commission's conclusion would withstand appeal. See, e.g., *Qwest v FCC*, 258 F.3d 1191 (10th Cir. 2001).

Yet there is a federal purpose to the federal accounting rules. See NARUC at 10-11; RUS at 3. "Meaningful economic competition" will not develop uniformly across the nation; hence the Commission may (and should) tailor its regulation to the local operating company level. Indeed, it is unlikely that competition will develop uniformly even on a local operating company level. Thus it should be up to the states to determine whether meaningful competition exists for a specific carrier in that particular state.

More importantly, the information that the Commission's accounting regulations and reporting requirements provides, for the entire nation, state-by-state and company-by-company, allows each state commission and each state advocate to compare the performance of specific companies in their state to the company's performance in other states and a national baseline, and allows comparison of that company to others on the same expansive basis.[19] This is clearly in the national, hence the federal interest.

Without these federal accounting regulations and reporting requirements, some states would be without the power to compel their telecommunications companies to maintain specific accounts and to report them.[20] Hence at best the national picture would be a patchwork quilt with significant blank spaces. In addition, states would not have the

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[19] See IndURC; MiPSC at 9; NARUC at 7; WisPSC at 4.

[20] See, e.g., MiPSC at 3-4.

ability to require the reporting of interstate information. Without this significant piece of the puzzle, even state-specific assessments would be meaningless.[21]

Further, those state commissions that retain the ability to prescribe accounting and reporting have relied on the uniform federal rule.[22] In the absence of a federal rule, each state would be inclined to tailor the accounting rules and reporting requirements to that state's concerns and issues. Hence carriers would be subject to a wide variety of rules and reporting requirements. See IllCC at 1; NARUC at 8; Sprint at 7-9.[23] For those carriers that seek the elimination of federal accounting and reporting requirements, this might be a case of "be careful what you ask for… you might receive it."

In § 161, Congress provided that the Commission could relax its accounting regulations in response to meaningful economic competition. Until such competition is ubiquitous, there is a clear federal interest in maintaining a national set of accounting standards and reporting requirements.

Conclusion

The Commission earlier asked commenters to discuss "whether and how the Commission and the states can carry out their respective statutory mandates without uniform and accurate accounting and reporting information." NPRM, ¶ 98. NASUCA

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[21] NARUC identifies (at 6) the prevention of cross-subsidy as a key product of uniform accounting requirements.

[22] See WisPSC at 2-3.

[23] As IllCC notes, "two of the major carriers operating in Illinois operate in approximately 13 to 17 states each."

suggests that the answer can be found in the various state commission comments in Phase 2, and in both parts of Phase 3; and the answer is that the mandates *cannot* be carried out without "uniform and accurate" information.[24] It may be that an increased level of competition -- above the current minimal level -- will reduce the need for regulators to have certain information. Only the advent of "meaningful economic competition" should result in a substantial reduction; only incumbent carriers becoming non-dominant will result in even more significant reductions in accounting and reporting requirements. Even when the local exchange market is fully competitive for residential customers, however, there will still be a need for regulators to have some level of uniform accounting and reporting information.

Respectfully submitted,

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[24] NASUCA supports the request of NARUC that the issues in this proceeding be referred to a federal-state Joint Conference. NARUC at 2. NASUCA further submits that given the interest of state utility consumer advocates in the accounting and reporting requirements, a NASUCA member should be included in this Conference.

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